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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORFOLK AND WESTERN RAILWAY COMPANY,
CHESSIE SYSTEM RAILROADS, and
SEABOARD SYSTEM RAILROAD, INC.,
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE
UNITED STATES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The exemption provision of the Interstate Commerce Act (49 U.S.C. § 10505) constitutes "an important cornerstone" of the landmark Staggers Rail Act of 1980, which was enacted to eliminate or reduce various aspects of railroad regulation. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980). Section 10505 provides that the Interstate Commerce Commission "shall exempt" transportation service from regulation when it finds that regulation:

> "(1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> "(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power."

In the decision reviewed by the Court of Appeals below, the Commission exercised its deregulatory authority pursuant to this section to exempt from continued regulation railroad movements of coal bound for export. The Commission, based on extensive evidence and findings concerning the competitive forces restraining railroad pricing actions, concluded that regulation was not necessary to carry out the national rail transportation policy, including the policy of maintaining reasonable rail rates, and was not needed to protect shippers from any abuse of market power.

The Court of Appeals set aside the Commission's decision, not because it found the findings to be arbitrary or lacking in evidentiary support, but because the Court concluded that the Commission's findings were legally inadequate in essentially two respects: first, the Commission had not found that the railroads possessed *zero* market power; and second, the Commission had not made detailed "nonconclusory" findings as to what rates would be rea-

sonable"—what are the railroads' revenue needs, what amount of gains they would experience under exemption, what share of any "economic rents" they deserve, and whether the revenues from exempt traffic would "disproportionately subsidize" other traffic—and whether such "reasonable" rates would result from competitive forces following exemption.

The case presents two questions:

1. By dismissing as a matter of law the Commission's critical findings that there would be non-abuse of market power and "reasonable" rail rates after an exemption from regulation due to the relatively equal bargaining power between railroads and export coal shippers, and by ruling instead that the Commission may grant exemptions only after making detailed predictive findings as to the prospective "reasonableness" of rates under deregulation, did the Court of Appeals for the District of Columbia Circuit mandate findings not required by Section 10505, vitiate the exemption provision, and turn the deregulatory intent of Congress on its head?

2. Did the Court of Appeals err in substituting its own judgment for that of the Commission with respect to the accommodation of competing statutory policies embodied in the national rail transportation policy?

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Norfolk and Western Railway Company
Chessie System Railroads
Seaboard System Railroad, Inc.
The Atchison, Topeka & Santa Fe Railway Company
Burlington Northern Railroad Company
Denver & Rio Grande Western Railway Company
Union Pacific Railroad Company
Utah Railway Company
Coal Exporters Association of the United States, Inc.
National Coal Association
Eastern Coal Transportation Conference
Coastal States Energy Company
Patrick W. Simmons (Illinois Legislative Director of the United Transportation Union)
Nippon Steel Corporation
Kawasaki Steel Corporation
Kobe Steel, Ltd.
Nippon Kohan K. K.
Nisshin Steel Company, Ltd.
Sumitomo Metal Industries, Ltd.
Interstate Commerce Commission
United States of America

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporation on whose behalf the instant petition is filed:

Norfolk and Western Railway Company:
Norfolk Southern Corporation
Des Moines Union Railway Company
Fort Wayne Union Railway Company
High Point, Thomasville & Denton Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company
Winston-Salem Southbound Railway Company

Southern Railway Company
Algers, Winslow and Western Railway Company
Augusta and Summerville Rail Road Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
High Point, Randleman, Asheboro and
Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

Chessie System Railroads:

CSX Corporation
Mid Allegheny Corporation
New Gauley Coal Corporation
Littleton Fuel Company
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Atlanta and West Point Railroad Company
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
North Charleston Terminal Company
Fruit Growers Express Company
Richmond-Washington Company
Allegheny and Western Railway Corporation
The Baltimore and Cumberland Valley
Railroad Extension Company
The Cincinnati Inter-Terminal Railroad Company
Trailer Train Company
Home Avenue Railroad Company
Richmond, Fredericksburg and Potomac
Railway Company

Seaboard System Railroad, Inc.:

(same as Chessie System Railroads)

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COAL EXPORTERS ASSOCIATION OF THE
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Norfolk and Western Railway Company, Chessie System Railroads, and Seaboard System Railroad, Inc., respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 18, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (per Judge Wright) is reported at 745 F.2d 76, and appears as Appendix A (App. 1a).[1] The opinion of the Interstate

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[1] Petitioners refer to, and incorporate, the Appendix accompanying the petition for writ of certiorari filed on December 3, 1984, in *Interstate Commerce Commission* v. *Coal Exporters Association of the United States, Inc.*, No. 84- ——. That petition seeks review of the same Court of Appeals judgment that is the subject of the instant petition.

Commerce Commission (the "Commission") is reported at 367 I.C.C. 570, and appears as Appendix C (App. 50a). A subsequent opinion of the Commission, denying a motion for an administrative stay pending judicial review, is unreported, and appears as Appendix D (App. 126a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984, and appears as Appendix B (App. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).[2]

STATUTORY PROVISIONS INVOLVED

The statutes principally involved are the exemption provision and other related provisions of the Interstate Commerce Act. 49 U.S.C. §§ 10101a, 10505. These pertinent provisions are set forth in Appendix E (App. 150a). Also involved is the Administrative Procedure Act. 5 U.S.C. §§ 551-706.

STATEMENT OF THE CASE

The Court of Appeals in this case has vitiated a fundamental provision of a landmark railroad deregulation statute. At issue is the construction of the exemption provision of the Interstate Commerce Act, which directs the Commission to exempt rail transportation service from regulation when it finds that regulation (1) is not necessary to carry out the national rail transportation policy

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[2] On November 9, 1984, the Court of Appeals, acting pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, entered an order staying, through and until December 3, 1984, the issuance of its mandate. The instant petition for writ of certiorari is filed during the period of the stay and, under Rule 41(b), the stay shall continue in effect until this Court makes a final disposition of this case.

and (2) is "not needed to protect shippers from the abuse of market power." [3] 49 U.S.C. § 10505.

In the administrative proceeding below, the Commission found that export coal shippers had ample transportation options and alternatives and that, as a result, the bargaining power of railroads and shippers is "relatively equal." 367 I.C.C. at 587 (App. 74a). Accordingly, it found—based on its view of the structure of the coal transportation market—that the rail rates that would result from exemption would remain reasonable, and that the railroads would not be able to "abuse" any market power they might have. 367 I.C.C. at 587, 594 (App. 75a, 85a). The Commission therefore exercised its authority under this provision to grant an exemption from regulation for movements of export coal by rail carriers.

The Court of Appeals did *not* disagree with the Commission's factual findings, or conclude that they were unsupported by substantial evidence. Instead, it concluded that those findings were *legally inadequate*—first, because the Commission had not found that the railroads would have *no* market power (App. 28a, 31a), and, second, because the Commission did not make detailed predictive findings with respect to the "reasonableness" of the rates and the precise distribution between railroads and shippers of any "economic rents" [4] that would result following an exemption from regulation (App. 43a-45a, 46a). Because it concluded that the Commission had

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[3] Because the Commission found that regulation of export coal rail traffic was not needed to protect shippers from the abuse of market power, it had no occasion to consider whether export coal traffic was a service of "limited scope" under the alternative standard of the exemption provision. 367 I.C.C. at 586 n.37 (App. 73a).

[4] "Economic rents," as the Commission explained, are the difference between the world market price of coal and the costs (including a reasonable return on investment) of producing and transporting that coal. 367 I.C.C. at 592 (App. 83a).

failed to make either of these additional findings, the Court of Appeals set aside the exemption decision.

Congress granted the Commission the exemption authority as "an important cornerstone" [5] of the strong deregulatory policy embodied in two recent statutes that have transformed the Commission's traditional role as regulator of rail rates: the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"),[6] and the Staggers Rail Act of 1980.[7] To understand the purpose of the exemption provision and the nature of the Commission's decision in this case, a brief review of the statutory framework is necessary.

A. Congress' Deregulation of the Railroad Industry in 1976 and 1980

The reasonableness of prices may be assured in basically one of two ways: regulation, or reliance on the market. The regulatory method typically involves determination by some government agency of a "reasonable" rate in light of the cost of service, the value of or demand for service, the revenue needs of the party performing the service, the profit in fact achieved, the efficiency of the performing party, and other related factors. The market approach focuses upon the structure of the market; if that structure is effectively competitive, and if no party can abuse whatever market power it may have, then reasonable prices are assumed to result from the bargaining that takes place in the market, and further elaborate regulatory inquiry is deemed unnecessary.

Traditionally, the reasonableness of railroad rates in the United States has been determined through regulation by the Interstate Commerce Commission and, to some ex-

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[5] H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980).

[6] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[7] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

tent, the State regulatory commissions. Prior to 1976, the Commission was charged with the general regulation of all railroad rates under a broad "just and reasonable" standard.[8] Rail carriers were required to reflect their rates in published tariffs and to charge shippers in strict accordance with such tariffs. The reasonableness of rail rates was subject to Commission review on the complaint of a shipper or on the Commission's own initiative. The Commission possessed the authority to determine and to prescribe for the future a "just and reasonable" rate.

In 1976, Congress radically changed this regulatory structure. Faced with mounting evidence that railroads were now constrained by vigorous competitive market forces and that existing regulation had both impeded the railroads' ability to compete and prevented them from generating sufficient revenues to sustain the nation's rail system, Congress determined that a significant relaxation of Federal regulation was essential. In the 4-R Act, Congress sharply curtailed the Commission's regulation of rail rates by providing that the Commission could review the maximum reasonableness of a challenged rail rate only after making a threshold determination that the rail carrier in question has "market dominance" over the specific traffic to which the challenged rate applies. 49 U.S.C. § 10709(b).[9] "Market dominance," in turn, is defined as the "absence of effective competition from

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[8] *See* Interstate Commerce Act, ch. 104, §§ 1, 15, 24 Stat. 379, 384 (1887).

[9] All references, unless otherwise noted, are to the Interstate Commerce Act as presently codified. That Act, including the amendments introduced by the 4-R Act, was recodified without substantive change in 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978). The Act was further amended by the Staggers Act which, however, did not alter the substance of the statutory definition of "market dominance." *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980).

other carriers to which a rate applies." 49 U.S.C. § 10709 (a). Thus, absent a finding of "market dominance," the Commission is without authority to examine the maximum reasonableness of, or to prescribe, a particular rail rate.

Dissatisfied with the progress and pace of deregulation under the 4-R Act, Congress in the Staggers Rail Act of 1980 made further fundamental changes in the Interstate Commerce Act—all designed to eliminate or reduce various aspects of railroad regulation. Among other things, the Staggers Act introduced further deregulation of rail rates in an effort to restore the financial health of the rail industry and to allow market forces to establish reasonable rates. The Staggers Act retained the substance of the statutory definition of "market dominance" but further circumscribed the Commission's authority to find "market dominance" by establishing a statutory presumption that a rail carrier is not market dominant unless its challenged rate yields a revenue-to-variable cost ratio above a specified figure. 49 U.S.C. § 10709(d).[10] Although railroads are still required to file tariffs and are subject to complaints (with respect to rate increases and new rates), their rates may not be declared unreasonable or unlawful unless the Commission first finds "market dominance," or the absence of "effective competition."

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[10] The Staggers Act made other deregulatory changes in the rate provisions of the Act. It authorized rail carriers to enter into contracts with shippers for the provision of specified services under specified rates and conditions; once a contract rate is in effect, it is no longer subject to regulation. 49 U.S.C. § 10713. In addition, the Staggers Act substantially reduced the ability of railroads to make and adjust rates collectively through rate bureaus. 49 U.S.C. § 10706. The Act further provided for a zone of rate flexibility for rail rate increases. 49 U.S.C. § 10707a. Finally, the Staggers Act provided a cutoff date for challenges even to market dominant rates. After this cutoff date, existing rates became immunized from challenge and only adjustments to these rates are subject to regulatory scrutiny. 49 U.S.C. § 10101a note (savings provisions).

Section 10505—the exemption provision—is an integral part of this statutory framework and the pronounced deregulatory policy underlying it. The exemption provision *complements* the "market dominance" provisions of Section 10709. Under Section 10709, rates continue to be regulated: railroads must continue to file tariffs; and if a shipper believes that a particular rate (or rate increase) is excessive, it may complain—and the Commission will first inquire whether the railroad, in the particular circumstances of the case, faces "effective competition" for the traffic to which the challenged rate applies. If a railroad is found to possess "market dominance," the Commission then proceeds to its regulatory review of the "reasonableness" of the rate.

Under the exemption provision, by contrast, the Commission is *not* required to act on a case-by-case basis after detailed analysis of the circumstances of particular shippers and railroads. Instead, based on its assessment of the characteristics of the market, the Commission may exempt a broad category of transportation services from the requirements of the Act—thereby making it unnecessary for the involved carriers to file tariffs, or to defend their rates by showing an absence of "market dominance" or the "reasonableness" of their rates under established regulatory standards. Congress specifically gave to the Commission the authority to deal with any particular abuses that may arise on an after-the-fact basis once an exemption from regulation is granted. 49 U.S.C. § 10505(d).

Congress clearly intended to confer on the Commission very broad discretion to eliminate all unnecessary regulation.[11] The Commission is "charged with the responsi-

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[11] The exemption provision was first enacted as part of the 4-R Act. Pub. L. No. 94-210, § 207, 90 Stat. 42 (1976). Although initially restricted to exemptions of "limited scope," the provision reflected Congress' firm belief that the Commission should have "considerable flexibility to try innovative, experimental programs

bility of *actively pursuing exemptions* for the transportation and service that comply with the section's standards," H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980), and is instructed to exercise its exemption authority to remove "*as many as possible* of the Commission's restrictions on changes in prices and services by rail carriers . . . ," H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (emphasis supplied). The Commission was further directed by Congress to remove existing regulation and to "adopt a policy of reviewing carrier actions *after the fact to correct abuses of market power.*" *Id.* (emphasis supplied). The exemption provision thus authorizes—indeed, commands—the Commission to go *beyond* the other deregulatory reforms introduced by the 4-R Act and the Staggers Act and to grant exemptions from continued regulation where, based on its assessment of the structure of the market, such regulation is no longer needed.

B. The Commission's Decision

This case began in March of 1981 when the Norfolk and Western Railway Company petitioned the Commission to exempt from regulation export coal traffic mov-

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to determine exactly what kind of less stringent regulation [would] work." H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976).

As "an important cornerstone" of the Staggers Act, H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980), Congress in 1980 substantially *broadened* the exemption provision. No longer restricted to exemptions of "limited scope," the provision now contains a positive command to the Commission to grant exemptions from regulation whenever regulation (1) "is not necessary to carry out the transportation policy of section 10101a of this title," and (2) "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505. The provision thus requires the Commission to consider the national rail transportation policy, a statutory list of 15 broad, and sometimes competing, policy considerations, including the policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U.S.C. § 10101a(6).

ing by rail through Atlantic and Gulf ports. The Commission, proceeding under informal rulemaking procedures, responded to the petition by issuing a notice of proposed exemption, which solicited public comment on the partial or complete exemption of all export coal rail traffic. The proposal attracted wide public comment from railroads, coal shippers, governmental entities and other.[12] The proceeding generated a voluminous written record.[13]

The railroad proponents submitted extensive evidence in support of the export coal exemption. This evidence demonstrated that rail carriers did *not* possess significant market power over export coal traffic because of the competitive nature of the world market for coal and because of the transportation alternatives and bargaining leverage available to coal producers and transshippers in their dealings with the railroads. The evidence showed that the export coal market is dominated by giant coal producers and transshippers, which produce and ship coal from a variety of mines located on more than one railroad—mines often served not only by rail but also by truck and/or barge carriers. As a result of their size and competitive options, export coal producers and transshippers enjoy very substantial bargaining leverage in dealing with the railroads, which therefore cannot generally exercise, much less "abuse," any significant degree of market power. As a result of this shipper bargaining leverage, in the period from 1969 to 1981, coal prices had increased faster than rail rates for hauling coal; and, until 1981 (when the exemption case commenced), no export coal shipper had filed any complaints with the

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[12] Four executive departments of the United States (the Departments of Commerce, Justice, State and Transportation) participated in the Commission proceedings and filed written comments.

[13] The written record contains verified statements from over 25 witnesses, including distinguished economists and transportation experts. The joint appendix in the Court of Appeals alone contains over 4000 pages from the administrative record.

Commission attacking export coal rates. In response to contentions that U.S. coal exports would be adversely affected by an exemption, the railroads also submitted evidence showing that, even if in some instance particular rail carriers enjoyed some market power over coal shippers, they would have no incentive to raise rail rates to the point where U.S. export coal production would decline, but rather would differentiate their rates to keep as many mines as possible in the market and to maintain total coal production and export volumes. The shipper opponents of the exemption introduced testimony seeking to rebut the railroads' evidence on all of these points.

On June 9, 1983, the Commission announced and released its final decision granting the export coal exemption. *Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983) (App. 50a). The Commission made the requisite statutory findings that the regulation of export coal traffic was not necessary to carry out the rail transportation policy and was not necessary to protect shippers from the abuse of market power. 367 I.C.C. at 599 (App. 92a). Accordingly, the Commission exempted all export coal traffic moving by rail through U.S. ports. The key to the Commission's decision was its conclusion that, due to the existence of a variety of vigorous competitive forces, railroads and coal shippers would have "relatively equal bargaining power," 367 I.C.C. at 587 (App. 74a), and that, accordingly, rail carriers could not "abuse" any market power to the detriment of coal shippers and export coal rail rates would remain reasonable.

The Commission first looked at the world market for coal. The Commission found that this market was characterized by "intense" and "[r]igorous" competition. 367 I.C.C. at 572, 576 (App. 53a, 59a). This competition sets a ceiling on the net delivered price of American coal sold abroad (that is, the cost of mining and transporting the coal). Any increase in rail rates that causes the net

delivered price of coal to rise above the established market price will result in a loss of business and coal exports as foreign buyers of coal look to other suppliers. 367 I.C.C. at 571-76, 592-93 (App. 52a-59a, 83a). Thus, the Commission found, the existence of strong worldwide competition effectively restrains the pricing actions of both coal exporters and rail carriers. 367 I.C.C. at 571, 592 (App. 52a, 82a).

The Commission did not, however, rest solely on the forces of world competition to protect shippers from an abuse of market power by railroads. For the existence of a ceiling on the net delivered price of American coal does not determine how the revenue or any "economic rents," from export coal are to be shared among railroads and the shippers they serve. Those rents are divided between railroads and coal shippers as they negotiate over the level of rail rates for specific coal movements. If a rail carrier enjoys greater bargaining power than a shipper, the railroad may be able to appropriate a greater share of the rents in the form of higher rail rates. Conversely, where the coal shipper enjoys bargaining leverage over a rail carrier, the shipper can be expected to capture a larger share of the rents. 367 I.C.C. at 595 & n.67 (App. 86a). The amount of bargaining power depends on the availability of alternatives and competitive options to shippers and railroads. The Commission found as a matter of fact that a variety of competitive factors insure that railroads and shippers enjoy "relatively equal bargaining power" and that, as a result, neither party would be able to capture all or a disproportionate share of any economic rents. 367 I.C.C. at 587 (App. 74a).[14] Thus, because of these competitive factors, rail rates would remain reasonable and ship-

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[14] In fact, the Commission found that railroads often had fewer alternatives than shippers because they depend so greatly on "increasing volumes of export coal to amortize their heavy investment and finance new construction." 367 I.C.C. at 593 (App. 84a).

pers would have sufficient bargaining leverage to prevent unreasonable pricing by railroads. 367 I.C.C. at 593 (App. 84a). These competitive forces derive from several sources.

First, the Commission relied on evidence of significant intramodal competition, or competition among railroads for export coal traffic. This competition exists, the Commission found, in large measure because most export coal purchases are arranged by large coal producers who own coal located on more than one railroad, or by transshippers, who purchase coal from mines located on more than one railroad. 367 I.C.C. at 571 (App. 52a). Because these large producers and transshippers are able to fill their orders from a variety of mines served by different railroads, they have substantial bargaining power vis-a-vis any one railroad. Any attempt by a railroad to charge an excessive rate would result in the producer or transshipper turning to mines located on a different railroad, thus depriving the first railroad of the business. This ability to choose among railroads confers substantial bargaining leverage on shippers, who can thus restrain railroads from charging excessive rates. 367 I.C.C. at 571-72, 578, 593-94 (App. 52a-53a, 61a, 84a-85a).

Second, the Commission found that railroad rates for export coal were also restrained by intermodal competition. 367 I.C.C. at 578, 594 (App. 61a-62a, 85a). Both existing and potential competition from trucks, barges and pipelines provide coal shippers with transportation alternatives, and thus prevent the railroads from successfully exacting high or abusive rail rates.

Third, the Commission concluded that geographic competition, or competition among carriers delivering coal for export from different regions of the country, provided a further check on railroad market power. 367 I.C.C. at 578-79, 594 (App. 62a-63a, 85a). Indeed, the Commis-

sion described such competition as "severe." 367 I.C.C. at 594 (App. 85a).[15]

As a result of all of these competitive factors, the Commission concluded that, following exemption, the bargaining power of railroads and shippers would be "relatively equal," that the railroads would not be able to appropriate all or even a disproportionate share of any economic rents, and that the forces of the market would establish reasonable and rational rates for export coal traffic. 367 I.C.C. at 587 (App. 75a). *See also* 367 I.C.C. at 578, 580, 582, 593, 594 (App. 61a, 64a, 67a-68a, 84a). Thus, railroads could not "abuse" market power. 367 I.C.C. at 594 (App. 85a).[16]

In granting the export coal exemption, the Commission also relied on two non-market checks on railroad market abuse: the existence of antitrust remedies for abusive or monopolistic practices and the threat of Commission revocation of the exemption should rail carriers fail to act reasonably. 367 I.C.C. at 595 (App. 87a). The Commission determined that these "important safeguards"

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[15] The Commission identified two other competitive restraints as well. First, it found that product competition, or competition among carriers for the movement of products that are substitutes for coal, was an "important factor." 367 I.C.C. at 594 (App. 85a). Second, the Commission found that coal producers can exert bargaining leverage by selling in the regulated domestic coal market. 367 I.C.C. at 594 & n.64 (App. 85a).

[16] The Commission buttressed its conclusions that railroads could not abuse market power and that shippers enjoyed "substantial bargaining power" by referring to the historic record of railroad export coal pricing behavior. 367 I.C.C. at 580-81 (App. 64a-65a). The Commission noted that the fact that no maximum rate complaints concerning export coal had ever been filed before 1981 was powerful evidence that rail rates had been constrained by competitive market forces. In addition, the fact that coal prices had over time increased faster than export coal rail rates suggested that shippers of export coal enjoyed "considerable economic bargaining power in the contest over division of the economic rents from export coal." *Id.*

would protect against any abuse of market power by railroads "even if a particular railroad were to develop sufficient leverage to be able to do so." 367 I.C.C. at 595-96 (App. 87a).

With respect to contentions that U.S. coal exports would be adversely affected by the exemption, the Commission relied on its principal findings that railroads and shippers enjoyed "relatively equal bargaining power" and that railroads would not be able, following exemption, to abuse any market power by exacting unreasonably high rail rates from coal shippers. However, the Commission added that, *even if* the railroads in some "rare instance" might enjoy some bargaining advantage over producers or transshippers, 367 I.C.C. at 594 (App. 85a), such railroads would not set their rates at levels that would result in a reduction of U.S. coal exports because, in that event, the railroads would have every incentive to differentiate their rates and maximize revenue at a competitive level of output. 367 I.C.C. at 581-82, 592-95 (App. 66a-67a, 83a-87a).

The Commission thus concluded in this case that, based on extensive evidence of competitive alternatives and non-market restraints on railroad pricing actions, continued regulation of export coal traffic was not needed to protect shippers from an abuse of market power or to maintain reasonable rail rates. The Commission also found that the exemption would "actively further" several important elements of the national rail policy by allowing rail carriers to respond quickly and flexibly to changes in the dynamic world market, by facilitating the use of efficient long-term rail contracts, and by assisting the railroads to earn adequate revenues. 367 I.C.C. at 586-92, 596 (App. 73a-82a, 88a).

C. The Court of Appeals' Decision

The Court of Appeals, on review of the Commission's exemption decision, expressly *declined* to disturb any of

the agency's factual findings, including its fundamental findings concerning the extensive competitive restraints on railroad pricing actions and the "relatively equal bargaining power" of railroads and shippers (App. 27a, 45a). However, the Court of Appeals vacated the exemption decision because, in its view, these findings failed, as a matter of law, to meet the requirements of Section 10505. The Court of Appeals reached this result by construing the exemption provision to require that the Commission undertake essentially the same regulatory inquiry, and make essentially the same regulatory findings, that would be required in individual rate cases.[17]

First, the Court of Appeals ruled that the Commission could have satisfied the exemption standard by finding that railroads possessed *zero* "market power" with respect to export coal traffic and therefore were constrained by "effective competition" (App. 28a). Such a finding would have required the Commission to make the same kind of individualized, "relatively specific inquiries" that would be necessary to prove "effective competition" in an individual rate case, where "market dominance" is at issue (App. 28a, 31a-32a n.20, 35a-36a n.21).

In the present case, the Court of Appeals pointed out that the Commission had not made an explicit finding of total absence of "market power" (App. 28a). The Court concluded that the Commission's extensive competition findings were insufficient to establish "effective competition" because they were not sufficiently specific or individualized (App. 31a-32a n.20). In addition, the Court of Appeals declared that the Commission's discussion of price discrimination negated the existence of "effective competition" and total absence of "market power" because

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[17] The Court of Appeals entirely ignored the Commission's reliance on non-market safeguards against abuse of market power by railroads, including antitrust remedies and the threat of revocation of the exemption.

price discrimination assumes the existence of some degree of market power.[18] Accordingly, despite the Commission's "repeated reference" to its findings concerning competition, and the Court of Appeals' decision not to disturb those findings, the Court disregarded them because it concluded they were of "minimal" legal importance (App. 46a).

Second, the Court of Appeals ruled that, even in the absence of a finding of "effective competition," the Commission could lawfully have granted the exemption—but only if it *first* made specific findings concerning (1) what rates and what division of any economic rents would be "reasonable," (2) the amount of competition that would exist under the exemption, and (3) whether the amount of competition existing after the exemption would produce such "reasonable" rates. Thus, the Court concluded that the exemption provision "includes within it" regulatory policy as to "reasonable" rates (App. 39a), that the exemption provision should "reflect the policies of the statutory [regulatory] scheme of which they are a part" (App. 44a), and that this regulatory scheme required consideration of such factors as "the actual revenue needs of the carriers involved," "the size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (App. 45a). The central point of the Court of Appeals' decision was its conclusion that the exemption provision obligates the Commission in such cases to determine in "non-conclusory

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[18] In this respect the Court of Appeals ignored the Commission's clear finding that railroads and shippers have "relatively equal barbaining power." 367 I.C.C. at 587 (App. 74a). In any event, as noted above, *see* pages 10, 14, *supra*, the purpose of the Commission's discussion of price differentiation was to show that, *even if* some railroads might have some degree of market power, they would not "abuse" such power by increasing rates to the point where total export coal production would fall.

terms" what a "reasonable" rate would be following exemption, and whether and how much competition would be sufficient to produce such "reasonable" rates (App. 46a).

The Court of Appeals ruled in this case that the Commission had failed to make the detailed findings necessary to satisfy this standard for granting an exemption from regulation. According to the Court of Appeals, the Commission never undertook to determine in "nonconclusory terms" what rates would result from the exemption, or to explain why such rates would be reasonable, or to predict the precise revenue impact of the exemption (App. 44a, 46a). Rather, the Commission relied on the existence of competitive forces and the "relatively equal bargaining power" of railroads and shippers to establish what the Court of Appeals termed an "undisclosed balance" in the establishment of rail rates and the division of economic rents (App. 46a).

In sum, the Court of Appeals interpreted the exemption provision to require highly specific, before-the-fact predictive findings that mirror the two regulatory phases of an individual rate reasonableness case. In the Court's view, the Commission in exercising its exemption authority must find *either* that there is *no* "market power" and, therefore, "effective competition," *or* it must go on and find that the rates resulting from the exemption will be "reasonable" in light of existing regulatory rate standards.

REASONS FOR GRANTING THE WRIT

In the last decade, Congress has deregulated major industries. The Staggers Rail Act of 1980 was the most significant effort by Congress to deregulate the rail industry, and the exemption provision at issue in this case was strengthened in a crucially important portion of that statute. This Court has not yet construed a single provision of the Staggers Act. Such construction is now necessary.

This case warrants plenary review because it presents substantial federal questions. Judge Wright's decision for the Court of Appeals willfully resists the deregulation agenda established by Congress and unlawfully vitiates the critical exemption provision. The Court of Appeals adopted a construction of Section 10505 that is inconsistent with its plain language, wholly at odds with its legislative history and expressed purposes, and contrary to the decisions of other appellate courts that have interpreted it. In addition, the Court of Appeals invaded the province of the Commission by imposing its own views as to the proper balance to be struck among the often competing policy objectives reflected in the exemption standard.

This Court should review the decision below in order to give effect to the deregulatory intent of Congress, to restore the proper scope of the exemption provision in relation to existing statutory provisions governing regulation of rail rates, and to correct the Court of Appeals' transgression of the respective roles of reviewing court and expert agency in implementing a broad Congressional delegation of authority to deregulate the railroad industry.

I. THE COURT OF APPEALS HAS DEMONSTRABLY VITIATED THE EXEMPTION PROVISION OF THE INTERSTATE COMMERCE ACT BY MANDATING DETAILED PREDICTIVE FINDINGS THAT ARE NOT REQUIRED, THEREBY DIRECTLY VIOLATING THE CONGRESSIONAL DEREGULATORY PURPOSE EMBODIED IN THE EXEMPTION PROVISION.

The Court of Appeals in the decision below interpreted the exemption provision in a manner that is contrary to its plain language and sharply at odds with Congress' deregulatory purpose. The Court's decision cripples the Commission in carrying out Congress' command—embodied in the exemption provision—to aggressively pursue the elimination of regulatory restrictions not necessary to protect shippers from any abuse of market power.

The Commission rested its decision in this case on the crucial finding, amply supported by the evidence and *undisturbed* by the Court of Appeals, that various competitive factors and transportation alternatives available to coal shippers combined to insure that railroads and shippers enjoy "relatively equal bargaining power" over the negotiation of rail rates for export coal. 367 I.C.C. at 587 (App. 74a). Because of this equality of bargaining power, and because of the additional non-market constraints, the Commission found that railroads could not "abuse" any market power they might have and that the rail rates resulting from the negotiations between rail carriers and shippers under the exemption would therefore be reasonable and represent a fair distribution of any economic rents. 367 I.C.C. at 587 (App. 74a-75a). In reaching this conclusion, the Commission did not engage in the elaborate, detailed line-drawing that would be required in regulating particular maximum rates; thus, it did not decide whether specific carriers were "market dominant" as to particular transportation services, nor did it try to predict with specificity the level of particular export coal rates following the exemption or to determine their "reasonableness," as it would do in regulating individual rates. Rather, the Commission looked to general market structure, including evidence of competitive forces and transportation options and alternatives available in the market, as the determining factors in the exemption decision.

(1) The Court of Appeals' decision erroneously holds that such findings with respect to general market structure and competitive alternatives are inadequate as a matter of law to support an exemption. It committed further error by holding that the Commission must make individualized, detailed findings either that rail carriers have no market power (App. 28a) or, alternatively, that the specific rates resulting from the competitive forces operating after exemption would be "reasonable" under

regulatory standards (App. 46a). Such findings are simply *not* required by the exemption provision of the Act. Section 10505 requires a finding that regulation is not needed to protect shippers from an "abuse" of market power—not that *no* market power exists. Once the required finding that regulation is not necessary to prevent "abuse" is made, Section 10505 does not require further findings predicting the rates which will result from exemption and assessing their consistency with regulatory standards of reasonableness.

(2) The Court of Appeals' decision is fundamentally contrary to the Congressional purpose underlying the exemption provision. Congress clearly expected that the exemption authority would be exercised in connection with broad categories or classes of traffic[19]—that is, the Commission would go beyond those specific movements already partially deregulated by virtue of the "market dominance" provision and other provisions of the Act. The Commission was instructed to "pursue partial or complete exemptions from remaining regulation." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). In removing "as many as possible" of existing regulatory restrictions on rail carriers,[20] the Commission was authorized to try "innovative," indeed "experimental" programs of deregulation,[21] and to review carrier action "after the fact" to correct any abuses of market power that might develop as a result of the exemption.[22] Thus, the exemption provision embodies a strong presumption in favor of deregulation.

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[19] Thus, Congress in 1980 amended the exemption provision to remove the requirement that exemptions be of "limited scope." *See* page 7, *supra*.

[20] *Id.* at 105.

[21] H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976).

[22] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).

At the heart of this presumption in favor of deregulation and the emphasis on "after the fact" review of specific carrier practices is a judgment by Congress that where the existing market structure is such that railroads cannot be expected to abuse market power, the Commission should grant an exemption and get out of the business of regulating the "reasonableness" of specific railroad rates. Indeed, the very purpose of an exemption from regulation for a broad class of traffic was to *relieve* the Commission of the responsibility and administrative burden of determining which specific rail carriers possess "market dominance" and whether particular challenged rates are "reasonable" as measured against prevailing regulatory standards. If any problems developed following exemption, they could be dealt with "after the fact" by the Commission, or by pursuing other federal remedies such as the antitrust laws.

The Court of Appeals, by mandating detailed predictive findings as to what rates would be reasonable and whether such rates would result from competition in a deregulated environment, subverts this basic purpose of the exemption. In effect, the Court of Appeals rejects the fundamental Congressional premise of deregulation—the belief that the structure of the market involved (in this case transportation of coal for export) may be sufficiently competitive that shippers *do not need* regulatory protection from abuse, and that the kinds of detailed regulatory inquiry into "market dominance" or rate "reasonableness" that were formerly required as to regulated rail traffic *are no longer necessary*. By requiring such an inquiry in an exemption proceeding, the Court of Appeals effectively nullifies Congress' intent in enacting the exemption provision to authorize broad exemptions from regulation. Further, the Court of Appeals' interpretation of the exemption provision would defeat Congress' declared intent to rely on "after the fact" review of specific carrier practices as a principal check on railroad abuse of market power. In essence, the Court of Appeals reversed the strong pre-

sumption in favor of deregulation by effectively reintroducing the regime of Commission rate regulation *as a prerequisite* to exemption from that very regulation. The Court's decision is therefore flatly contrary to—and directly undermines—the broad deregulatory purpose of the exemption provision.

(3) Moreover, by requiring the Commission in an exemption proceeding to make determinations as to the presence of "effective competition" and the "reasonableness" of rail rates, the Court of Appeals would render the exemption provision essentially superfluous. Under the Court's decision, the Commission would only be able to exempt traffic from regulation by making the kinds of regulatory findings that would result in rate approval in the absence of an exemption. The legislative history of the exemption provision makes it clear that such a result was not intended by Congress. The Staggers Act Conference Report, which recommended the exemption provision in its present form, declared unambiguously that the section "permits exemptions wherever regulation is not needed to prevent abuses of market power, *regardless of the presence of effective competition.*" H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (emphasis supplied).[23] Thus, Congress made it clear that, in adopting an "abuse of market power" standard, it did not intend to incorporate the same kind of threshold determination of "effective competition" or "market dominance" that would be required in individual rate cases.[24] The Court of Appeals openly flouted this clear expression of legislative intent

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[23] Indeed, even the exemption provision enacted by the House, where the "effective competition" language originated, would have authorized exemptions in the absence of "effective competition." *See id.* at 104.

[24] The Fifth Circuit, in *American Trucking Associations, Inc.* v. *ICC*, 656 F.2d 1115, 1125-1126 & n.18 (5th Cir. 1981), also relied on this statement from the Conference Report and reached this same conclusion. The Court of Appeals below did not acknowledge the Fifth Circuit's opinion on this point.

by engrafting onto the exemption provision the same threshold standard of "effective competition" that Congress expressly said was not required.

The Court of Appeals committed further error by requiring the Commission, when it finds an absence of "effective competition," to determine whether the rates resulting from exemption would be "reasonable." [25] Thus, the Court's decision not only mandates the threshold inquiry that Congress declined to require, but it also turns the exemption proceeding into essentially the same kind of detailed rate reasonableness inquiry that would be necessary in individual rate cases in the absence of an exemption.

(4) Finally, the Court of Appeals' decision in this case is in conflict with both of the appellate decisions that have reviewed Commission exemptions from railroad rate regulation. In neither case did the Commission or the reviewing courts conclude, as the Court of Appeals did here, that the exemption provision requires the Commission to find either the presence of "effective competition" or that the specific rail rates resulting from the exemption would meet regulatory standards of rate reasonableness. Thus, in *American Trucking Associations*, *supra*, the Fifth Circuit affirmed the Commission's exemption of railroad trailer-on-flatcar traffic, holding that the Commission's findings with respect to general market structure (falling

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[25] The Court's decision suggests that the Commission would have to consider in an exemption proceeding such regulatory criteria as "the actual revenue needs of the carriers involved," "the size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (App. 45a).

Such an inquiry in an exemption case would closely parallel the regulatory inquiry in a rate "reasonableness" case, in which the Commission considers the revenue needs of the rail carrier and the profit earned from the rate in question, 49 U.S.C. § 10701a(b), and also considers whether the rate may disproportionately subsidize other rail traffic, 49 U.S.C. § 10707a(e).

far short of an individualized showing of "effective competition") and reliance on antitrust remedies and "after the fact" review were sufficient to satisfy the exemption statute. And in *Brae Corp.* v. *United States*, 740 F.2d 1023, 1039-40 (D.C. Cir. 1984), the D.C. Circuit held that the Commission lawfully exercised its exemption power when it exempted boxcar traffic from maximum rate regulation on the basis of general market constraints —constraints which were acknowledged not to be applicable to all railroads and shippers involved in the exempted traffic.[26] In both cases, therefore, the Commission was permitted, consistent with the policy of the exemption authority—and consistent with the Commission's decision in the instant case—to grant exemptions from regulation on the basis of general market structure, without inquiring into the reasonableness of specific rail rates resulting from the exemption. These decisions thus are in plain and obvious conflict with the stringent findings and standard imposed by the Court of Appeals below.

In sum, the Court of Appeals' decision in this case raises important questions concerning the interplay between the exemption provision and the maximum rate provisions of the Interstate Commerce Act. The Court of Appeals has erroneously required regulatory scrutiny of railroad rates in construing the exemption provision. This purported accommodation of the rate regulatory provisions and the exemption provision effectively emasculates the exemption provision. This Court should grant the requested writ to correct this serious error and to restore the exemption authority to its intended place in the statutory structure of recent railroad deregulation statutes.

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[26] In *Brae Corp.*, the Court of Appeals' discussion of general market constraints was made in connection with its affirmance of the Commission's exemption of boxcar traffic from maximum rate regulation. The Commission has petitioned this Court to review a *different* portion of the Court of Appeals' decision, which reversed the exemption decision insofar as it related to the so-called car hire rules governing boxcar movements. *See ICC* v. *Brae Corp.*, No. 84-550.

II. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE COMMISSION WITH RESPECT TO THE ACCOMMODATION OF COMPETING STATUTORY POLICIES.

This Court should grant the writ and review the judgment of the Court of Appeals for another reason. The decision of the Court of Appeals misconceives the proper role of a reviewing court and represents an improper invasion of the broad policymaking authority explicitly conferred on the Commission by Congress in the exemption provision. Notwithstanding its purported application of a narrow standard of judicial review, the Court of Appeals reached its result only by injecting its own views as to the proper balance to be struck among the competing policy objectives set forth in the national rail transportation policy. Because the Court of Appeals' actions represent a serious transgression of the proper bounds of judicial review as articulated by this Court and, in the process, subverts the Commission's ability to implement its exemption authority as Congress intended, this Court should grant review.

As an exercise of informal rulemaking authority, the Commission's export coal exemption decision could be set aside by the Court of Appeals only if that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although agency discretion is not unlimited, judicial review of agency action under this standard is, under settled and familiar principles, both very narrow in scope and highly deferential to the expert judgment of the agency.[27]

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[27] The reviewing court is not empowered to substitute its judgment for that of the agency. *See, e.g., Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866 (1983); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

Rather, the court's limited function is to determine whether the agency's decision was based on a consideration of the relevant

This Court has determined that judicial deference to an agency's decision is especially appropriate when that decision rests on judgments of policy. A "rational weighing of competing policies" [28] by the agency is entitled to respect by the courts, even where such policy judgments are based on an interpretation of the agency's governing statutes. *See, e.g., Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2781-83 (1984). Moreover, an agency's attempt to predict the effects of its actions is similarly entitled to judicial deference. "In such cases complete factual support for the Commission's ultimate conclusions is not required since 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [29]

The authority to exempt classes of rail traffic from regulation was granted to the Commission along with an affirmative command by Congress to deregulate rail transportation whenever continued regulation is not necessary to protect shippers from the abuse of market power. The legislative history makes clear that Congress believed that the Commission should be entrusted with the important task of deciding the nature and scope of further deregulation:

> "The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, *the Commission is more capable* through the administrative process of examining specific regula-

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factors and whether the agency articulated a rational connection between the facts found and the choice made. *Motor Vehicle Manufacturers, supra*, 103 S. Ct. at 2866-67; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

[28] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

[29] *Id.* at 595 (quoting *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978)).

> tory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." (Emphasis supplied).

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). In addition, the legislative history demonstrates that Congress understood the exemption authority to entail a significant element of policymaking, as it authorizes the Commission "to try innovative,, experimental programs to determine exactly what kind of less stringent regulation may work." H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976). Congress further directed the Commission in exercising its exemption authority to review carrier action "after the fact" to correct any perceived abuses of market power. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Thus, the entire exemption provision is founded on the assumption that the Commission—the agency having expertise in the area of rail regulation—is most capable of defining the appropriate scope of deregulation and that the Commission is in the best position to review its actions and correct unanticipated market abuse. Until the present case, reviewing courts had respected this institutional role of the Commission.[30]

The Court of Appeals, while paying lip service to the Commission's "very broad authority" under the exemption provision (App. 10a), in fact intruded on the Commission's statutorily delegated authority to determine the nature and scope of deregulation under the exemption provision. The Court of Appeals exceeded its proper function by undertaking itself to accommodate the competing statutory policies reflected in the exemption provision and in the Staggers Act generally—an accommodation that Congress entrusted to the Commission and not to reviewing courts. As the Court of Appeals recognized,

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[30] *See, e.g., American Trucking Associations, supra,* 656 F.2d at 1127 (referring to "broad discretionary power" of the Commission under the exemption provision).

the Staggers Act was in part an attempt to balance the conflicting interests of railroads and shippers (App. 8a-10a n.6). This balance is reflected in the national rail transportation policy itself, which contains competing statutory objectives, ranging from the minimization of Federal rail regulation and promotion of competition to the achievement of railroad revenue adequacy to the assurance of reasonable rail rates for shippers. 49 U.S.C. §§ 10101a(1), 10101a(2), 10101a(3), 10101a(6). By incorporating these diffuse policies into the exemption standard, Congress charged the Commission with the task of reconciling and accommodating those policies in specific cases.

The Court of Appeals in this case violated this statutory scheme. Treating the national rail transportation policy as if it were a virtual checklist of fully consistent policies, the Court of Appeals exalted one element of the policy over all others: the policy of assuring "reasonable" rail rates where there is an absence of effective competition. 49 U.S.C. § 10101a(6) (*see* App. 5a, 27a, 34a-36a). The Court completely discounted the other elements of the national transportation policy that the Commission found would be "actively further[ed]" by the exemption of export coal. 367 I.C.C. at 586 (App. 73a). *See* page 14, *supra*. By elevating one policy over all the others, the Court of Appeals impermissibly reached an accommodation which Congress explicitly left to the Commission to make.

Thus, the Court of Appeals has unlawfully intruded on the domain of the Commission in carrying out the broad purpose of the exemption authority. In short, the Court of Appeals did here what this Court has repeatedly told reviewing courts that they cannot do: substitute their own judgment as to the wisdom of policy choices entrusted to the agency's decision. This Court should grant the requested writ to correct this fundamental error.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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